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Supreme Court, U.S.
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No. 99-927

In The

Supreme Court of the United States

WAYNE ANTHONY ROSS, REPUBLICAN PARTY OF ALASKA, INC., ALASKA LIBERTARIAN PARTY, ALASKAN INDEPENDENCE PARTY, MARK CHRYSON AND LINDA S. McKAY,

Petitioners,

v.

STATE OF ALASKA, STATE OF ALASKA DIVISION OF ELECTIONS, LIEUTENANT GOVERNOR FRAN ULMER, IN HER OFFICIAL CAPACITY OF SUPERVISOR OF ELECTIONS, AND SANDRA J. STOUT, IN HER OFFICIAL CAPACITY OF DIRECTOR OF THE DIVISION OF ELECTIONS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

This reply will briefly respond to the arguments made by the State of Alaska. At this point, it is even more clear that certiorari should be granted, and that it is proper for this Court to do so.

I. THIS CASE IS IDENTICAL, IN PERTINENT PART, TO *CALIFORNIA DEMOCRATIC PARTY V. JONES*, IN WHICH THIS COURT HAS RECENTLY GRANTED CERTIORARI.

On January 21, 2000, this Court granted certiorari in *California Democratic Party v. Jones*, Docket No. 99-401. The question in *Jones* is whether the California law which allows voters of any political party affiliation to participate in the selection of other parties' candidates is a violation of the right to free political association. The case at bench presents the same question and also involves the issue of whether political parties can be forced to participate in a primary election process at all if the party desires to select candidates in another manner such as nominating convention. Certiorari should be granted in this case in order to present a more generalized question to the Court than is presented in the *Jones* case. This Court should consider whether political parties have the right to determine their method of candidate selection (i.e., election, convention, etc.) as opposed to simply who may vote, when the political parties have not objected to being forced into an elective process.

II. THE TRIAL AND APPELLATE COURTS ERRED IN CONCLUDING THAT THERE WAS NO CASE OR CONTROVERSY BETWEEN THE MINOR PARTIES AND THE STATE.

The lower courts should have allowed the Alaskan Independence Party (AIP) and the Alaska Libertarian Party to litigate the merits of their claims. The holding of the lower courts that there was no case or controversy between the minor parties and the State of Alaska is clearly erroneous.

Bylaw 5.15 of the AIP specifically provides:

> In any election for public office where the Alaskan Independence Party is authorized by law to nominate a candidate, the State Committee shall be empowered to present a nominee in the name of the Alaskan Independence Party or to reject any candidate not an Alaskan . . .

The AIP desired to select its candidates outside of the state-mandated blanket open primary process, and, for the 1998 election, desired to disavow the former Democrat who had been selected as the AIP gubernatorial candidate through that process. No application for approval of this process had been made to the State Division of Elections because the State would have had to deny the application as a matter of law. No application was made for U.S. Department of Justice preclearance because the Justice Department previously made it clear that it would not preclear a process which requires a judicial declaration to implement without that judicial declaration having been made. The case at bench was the necessary beginning of the process of implementing the candidate selection process desired by the AIP.

The pertinent bylaw of the Alaska Libertarian Party provides, in part:

> A candidate may be selected in a regular or special state party convention by a majority of the paid up Alaska LP members in attendance. A candidate may be selected outside of state convention by a majority of the Alaska LP executive committee.

The Alaska Libertarian Party participated in this litigation in order to obtain a declaration of its rights for when it became a ballot-qualified party. It is now a ballot-qualified party.

Both of these political parties had real cases or controversies, and the case should not have been dismissed for lack of same.

III. THE REPUBLICAN PARTY COULD NOT PRESENT THE NECESSARY QUESTIONS FOR JUDICIAL RESOLUTION BECAUSE BOTH THE TRIAL AND APPELLATE COURTS ERRED IN CONCLUDING THAT RES JUDICATA APPLIED.

The question which needs to be answered is whether the political parties or the state has the right to determine the manner in which the parties choose their candidates. This basic question could not have been presented to the lower courts for decision because those courts erroneously held that the Republican Party of Alaska (RPA) was precluded by *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996), *cert.den.*, 920 U.S. 1207 (1997) from presenting that question.

There are a number of reasons that the District Court should not have applied res judicata against the RPA, including, but not limited to:

(1) A state case, such as *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996), *cert.den.*, 920 U.S. 1207 (1997), which is clearly erroneous as a matter of federal law, should not be accorded preclusive effect by the federal courts, e.g., *Red Fox v. Red Fox*, 564 F.2d 361 (9th Cir. 1977).

(2) The RPA has never had an opportunity to develop any record on the relevant issues in any state or federal court proceeding, despite having requested an opportunity to do so. It is a denial of due process to give preclusive effect to a prior decision reached in such a manner, e.g., *Silverton v. Department of the Treasury*, 644 F.2d 1341 (9th Cir. 1981).

(3) The RPA has never submitted any of its federal claims, without reservation, to be decided by the Alaska State courts. It filed this case in federal court before it responded to the request of the Supreme Court of Alaska to intervene in the *O'Callaghan* case. Preclusive effect should not be imposed in this type of situation, e.g., *Haring v. Prosise*, 462 U.S. 306, fn. 7 (1983).

Contrary to the argument of the State of Alaska, there is no value in giving preclusive effect, in the interests of judicial economy, to a clearly erroneous decision entered in the manner in which it was entered, to deprive a political party and its members of the right to free political association guaranteed by the First Amendment to the Constitution of the United States. First Amendment rights are entitled to more protection than that.

CONCLUSION

Now that the certiorari has been granted in *California Democratic Party v. Jones*, it is still necessary that certiorari be granted in this case, but certiorari may not need to be granted immediately. The petitioners here will be moving to file an amicus brief in *Jones* and present their position that this Court should broaden the question and hold that the political parties have the right to choose the manner of selection of their own candidates – whether it be by closed or open primary, convention, or some other method. Certiorari should be granted immediately, however, if this is necessary to broaden the question beyond merely who may vote in a primary election.

At some point, this Court should grant certiorari in this case, reverse the decision of the Court of Appeals, and remand the case to the District Court with directions that it reinstate the case and decide it in accord with the federal law as will be determined by this Court in the *Jones* case. This Court must make it clear that the case is to be decided by the District Court in accord with the law to be set forth in *Jones*, and not in accord with the law set forth in *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996), *cert.den.*, 920 U.S. 1207 (1997).

Respectfully submitted,

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